

Friday, 4 October 1946

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Application by Prosecution for consent
to employ the Russian language in the
presentation of that phase of the case.

Paper No. 444 - Application on behalf of
the Prosecution under Rule 6(b)(1) pertaining
to IPS Document No. 174.

Paper No. 448 - Application on behalf of
the Prosecution under Rule 6(b)(1) pertaining
to IPS Document No. 794A.

Paper 431 - Amendment to Application (Paper
No. 423) on behalf of the Prosecution under
Rule 6(b)(1) pertaining to IPS Document Nos.
2457, 2527 and others.

Before:

HON. SIR WILLIAM "EBB,
President of the Tribunal and
Member from the Commonwealth of
Australia.

Reported by:
Sam Goldberg

Appearances:

For the Prosecution Section:

R. H. QUILLIAM, Brigadier, Associate Counsel, acting on behalf of New Zealand

MR. JOSEPH B. KEENAN, Chief of Counsel, acting on behalf of the United States of America.

MR. SOLIS HORWITZ

MR. EUGENE D. WILLIAMS

MR. GROVER C. HARDIN

MR. S. A. GOLUNSKY, Associate Counsel, acting on behalf of the Union of Socialist Soviet Republics.

For the Defense Section:

MR. WILLIAM LOGAN, JR., Counsel for the Accused KIDO, Koichi.

MR. MICHAEL LEVIN, Counsel for the Accused SUZUKI, Teiichi.

MR. OWEN CUNNINGHAM, Counsel for the Accused OSHIMA, Hiroshi.

MR. JOSEPH G. HOWARD, Counsel for the Accused KIMURA, Heitaro.

MR. GEORGE F. BLEWETT, Counsel for the Accused TOJO, Hideki

For the Office of the General Secretary, IMTFE:

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat.

MR. CHARLES A. MANTZ, Clerk of the Court

THE PRESIDENT: This is an application for consent to employ the Russian language in the presentation of that phase of the case.

Well, I know this is a matter upon which members of the Court are not unanimous. Some judges think there is no power to allow a language other than Japanese and English; others take the view they have a discretion, and that they must exercise it having regard to the duty to conduct an expeditious trial; others think there is a duty to allow a prosecutor to speak in his own language or to employ his own language in the presentation of his case, if he thinks fit. There is not a majority for any particular view. I would have given reasons the other day if I could have given them, but I could not give the reasons of the majority that the majority would accept because they came to their conclusions for different reasons; and I think that I shall have to submit this application to the whole Court.

MR. KEENAN: In Chambers.

THE PRESIDENT: Well, if they are prepared to sit in Chambers -- I will ascertain whether they are prepared to sit in Chambers.

MR. KEENAN: I wanted, Mr. President, to bring the Court's attention to the fact that very probably it has been interpreted there is already a commitment to the Soviet Government by the joint chiefs of staff in this Court on that subject.

THE PRESIDENT: It would not affect the attitude of the members. That would be determined wholly by the Charter.

MR. KEENAN: Has the Court made a holding that it does have discretion to permit the use of another language?

THE PRESIDENT: I said there is not a majority for any view. There are three views. The three views are these. I have already stated them. First, that there is no power to enable any prosecutor -- there is no power for any prosecutor to present his case in other than the English or the Japanese language.

MR. KEENAN: Well, that must be a minority view, I take it.

THE PRESIDENT: As I said, there is not a majority for any view.

MR. KEENAN: I am unable to follow that, sir.

I don't understand it.

THE PRESIDENT: Listen to this. It is quite clear. It is clear as day if you listen. There are also some members, not being a majority, who think that there is a power, to allow a prosecutor to present his case in his own language, but not a duty; and that the power must be exercised with regard to the obligation to conduct a speedy trial.

There is a third section that think there is a duty to allow each prosecutor to present his own case in his own language. You have got those who think there is no power to allow any language, but English and Japanese, those who think there is a discretion in the Court, those who think there is a duty in the Court to allow prosecutors to present it in their own language. Perhaps I had not been correct in saying there is not a majority in favor of discretion, but I could not the other day give reasons for our judgement because the reasons I would give would not appeal to all those supporting the judgement. It is a remarkable division of opinion, but you can expect it where there are so many nationalities. It is only reasonable to expect it where there are so many systems of law, so many views of documents. Some take the broadest views, some the narrowest; some take the intermediate view.

MR. LOGAN: Defense, your Honor, would like to have this argued in Court, not in Chambers.

THE PRESIDENT: I certainly would not decide it in Chambers. I had to tell you this because I want you to know my reason for not taking the responsibility of deciding it; but whether the judges are prepared to do it in Chambers or not, I am not in a position to say. I am only one of eleven. I do not control them.

MR. KEENAN: The Russian phase would probably be reached Monday.

THE PRESIDENT: Well, I shall try to get them -- I will see them this morning as soon as we meet here to go into Court at 9:30. I will put this matter to them.

MR. CUNNINGHAM: I think it should be held in the open Court in full Tribunal.

THE PRESIDENT: We will have your views accordingly and I will put them. Is that the view of the defense generally?

MR. CUNNINGHAM: Yes, sir.

MR. KEENAN: May I ask, Mr. President, what is the advantage of taking up the time of the Court and the lengthy record and repetition in the Japanese language on a matter that is purely procedural?

THE PRESIDENT: I cannot answer for eleven judges

MR. KEENAN: It is so different from the

procedure that all of the counsel I know of have been accustomed to on procedural matters. They are almost invariably taken up in Chambers for time-saving purposes.

THE PRESIDENT: The judges authorized me to deal with these applications for further material by the defense, also for the cutting down of material the prosecution might process; but they have not authorized me to deal with this very delicate question.

MR. LOGAN: Well, we are always glad, your Honor, to take up procedural matters in Chambers. This is more than a procedural matter. This goes to interpretation of the Charter.

THE PRESIDENT: That is the position I am in.

MR. KEENAN: Where is it claimed they are mutually exclusive. The suggestion has been made that since it is an interpretation of the Charter, it is not a procedural matter. It seems to me it is strictly a procedural matter.

THE PRESIDENT: I can assure you that I could not safely give any decision in Chambers.

MR. KEENAN: Well, could not the entire Tribunal meet in Chambers?

THE PRESIDENT: I cannot speak for them, Mr. Keenan. That is a matter upon which they are to be consulted.

MR. KEENAN: May I ask the Court respectfully if that request is to be made?

THE PRESIDENT: I said I would make it as soon as we meet here this morning. I am afraid my position in this Court is grossly misunderstood. One would think, reading the papers, that I am responsible for every decision that is given, that it is my decision and nobody else's. In many of the decisions - on many occasions I have been in a minority.

Is there any other matter? I will refer that matter of the further question of the language to the judges.

MR. MANTZ (CLERK OF THE COURT): Paper 444.

THE PRESIDENT: This is an application by the prosecution for liberty to process part only of certain documents.

MR. LOGAN: If your Honor please, that application was up once before. It was adjourned so that Mr. Hardin and the defense could get together to determine the question of excerpts, and we have come to an agreement on the excerpts to be obtained from over -- I believe it is 105 documents; so an order will be tendered without going into each document in detail. Mr. Hardin and the defense have agreed that such an order may be entered.

MR. HARDIN: Mr. President, we have already submitted all of his requests to the Processing Department, and it is our thought that it is not necessary to go into detail and recite all of them because it would take a long time to prepare such a presentment here for your order, a simple order that could be granted; and, further, that we, upon agreement between us, that we be required to have processed their requests. I would like to say this much additionally: the time is an important element with the processing people. Already Mr. Logan says that it is not imperative that their request be processed by the time they get ready to go to trial -- but our own -- if it is processed in time for them at a later date. So the idea is that the prosecution's request be given priority in processing over them. Nevertheless, that it be required to be processed.

THE PRESIDENT: Well, the order is agreed?

MR. HARDIN: Yes, sir.

THE PRESIDENT: With that explanation the order granted as prayed.

This is a similar explanation with respect to document 794-A?

BRIGADIER GENERAL QUILLIAM: I understand there is no objection there, sir.

MR. LOGAN: No objection.

THE PRESIDENT: No objection by the defense?

MR. LOGAN: None by the defense.

THE PRESIDENT: The order as prayed.

This is a similar application with respect to document 608?

MR. LOGAN: That is an application made by the Russian prosecution. There is no objection to that either.

THE PRESIDENT: Order as prayed.

This is a similar application with respect to exhibit 58, document No. 58?

CLERK OF THE COURT: It is exhibit 58.

THE PRESIDENT: It is called "document No. 58" -- in the heading, and in the body it is called "exhibit No. 58."

Well, what is the position as regards that?

MR. LOGAN: With respect to that, your Honor, it is that these documents cover the report of proceedings and hearings held before the Joint Committee on Investigation of Pearl Harbour Attack. Mr. Hardin graciously submitted to me three volumes of those hearings, and the prosecution desires to take excerpts from these volumes concerning Secretary Hull's testimony; and we have perused the excerpts which they, the prosecution, desire. In addition to that we have requested certain further excerpts. I think Mr. Hardin has agreed to all those with the exception of one particular excerpt that we have requested which is rather lengthy, is that correct, Mr. Hardin?

WD letter 25 Oct.
'46

Para. 2.b.

NOTE:

The attached pages are corrected
pages and should be substituted for the
corresponding pages in the record. 4 OCT 1946

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MR. HARDIN: Yes, Sir.

MR. LOGAN: I could read these off, the ones that are agreed to. They are very short, if you want it on the record?

(1) Beginning on page 1089 at line 5, to page 1090 at line 3.

(2) Beginning on page 1090 at line 19, to page 1090 at line 5.

(3) Beginning on page 1091 at line 9, to line 15 of the same page.

(4) Beginning on page 1101 at line 20, to page 1102 at line 17.

(5) Beginning on page 1114 at line 2, to page 1115 at line 7.

(6) Beginning on page 1119, the last paragraph thereof, and continuing to page 1120 at line 5.

(7) Beginning on page 1137, the entire second paragraph thereof.

(8) Beginning on page 1189 at line 11, to page 1190 at line 7.

(9) Beginning on page 1472 at line 2, to line 23 of the same page.

(10) All of page 1136 to the end of page 1165, consisting of approximately 30 pages.

The excerpts which we desire, and which there is disagreement between counsel is page 1189, line 11 to page 1190, line 7.

The reason we desire that --

MR. HARDIN: Would you pardon me, Mr. Logan?
You gave me 1136 --

MR. LOGAN: I am sorry. It is 1136 to end of page 1165. That is the last one.

The prosecution has taken as its excerpts that part of Secretary Hull's statement which he made when he appeared before the Investigation Committee up to approximately May, 1941. In other words, the testimony of the prosecution covers that period. And the excerpts

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Page 1008, line 5

Page 1089, line 19 to page 1090, line 5.

Page 1091, line 9 to line 15.

Page 1101, line 20 to page 1102, line 17.

Page 1104, line 2 to page 1105, line 7.

Page 1119, last paragraph to page 1120, line 5.

Page 1133, second paragraph.

Page 1189, line 11 to page 1190, line 7.

Page 1472, line 2 to page 1472, line 23.

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we desire cover Secretary Hull's testimony with regard to the Japanese ultimatum of November 20th, and United States Government's reply; and this excerpt covers a day by day account of what were Secretary Hull's activities with respect to the possibilities of some sort of an agreement being arrived at between both governments and a knowledge of Secretary Hull with respect to any attack and also it covers the American document of November 26th which was handed to the Japanese representatives, and it covers also another heading, what Secretary Hull calls "The Last Phase." In that "last phase" he covers quite completely the press conference that he had on November 27th, 1941 and his portrayal and description of the opposing factions which are in Japan, and he covers the Indo-China situation. In other words, it is complete right up to and including December 7th, 1941; and we feel that that is very important with respect to the defense's case and while it covers approximately thirty pages, we deem it of extreme importance to the defense that that should be processed. Of course, as we explained in other motions here before, we don't need this right away, but we think that in view of the basic rule of the Court that it should be processed by the prosecution for us.

THE PRESIDENT: After careful perusal of those thirty pages, you think they are necessary for your defense?

MR. HARDIN: Mr. President, when yesterday Mr. Logan gave me this, I had the volume before me. I asked him to give it further consideration last night to see if he could eliminate any part of it. In justice to his case, I have glanced over it this morning and have read it before. There is no question of its relevance so far as that is concerned. We thought we had covered that phase of the case definitely with other evidence that we had. We had not called for that and we had not provided for this; but if they feel they have to have it, there is time for it and we are required to produce any, I suppose we will have to go ahead and produce it.

MR. LOGAN: You see, your Honor, while this may be covered by other documents and other means by the prosecution, yet this is Secretary Hull's own testimony in regard to what happened, which is, perhaps, the best evidence obtainable.

THE PRESIDENT: The weight of it affects you?

MR. LOGAN: Yes.

THE PRESIDENT: Well, I think you ought to have it so I will make an order covering those 30 pages. That is all there is?

MR. LOGAN: Those other lines the stenographer has record of which were agreed upon.

THE PRESIDENT: That is the whole of the business. Is there another matter?

MR. HARDIN: There is still that the prosecution's own testimony should take priority over this.

MR. LOGAN: No question about it.

There is one other matter that is not set for this morning. We might dispose of it this morning. Mr. Howard would like to speak of it. That is with respect --

MR. HOWARD: Paper 439 request for production of witness Lieutenant Colonel SUGITA. That was carried over from 19th of September. At that time I asked that the application be amended to include the names of Major General SAITO and Lieutenant Colonel BANO who were wanted by attorneys for other accused; but since you wanted further information, I have decided to withdraw that request that they be included and ask only for Lieutenant Colonel SUGITA. My Japanese counsel says that if Colonel SUGITA is called, that it is his belief that he will testify that he, Colonel SUGITA, had instructions from General YAMASHITA to the effect that civilians should be treated fairly and kindly; two, that Colonel SUGITA will testify the inevitable reason why the Japanese military authority had to put more than thirty-five hundred civilians in Changi Prison; three, Colonel Wild had free access to Japanese military

authority offices as a liaison officer, but Colonel SUGITA can testify that his freedom was restricted, not unrestricted as Colonel Wild said. Therefore, Colonel Wild cannot say he saw or knew everything; four --

THE PRESIDENT: Well, I think you have given me enough. I don't want to hear more. That is sufficient for my purposes. I will direct a subpoena to issue.

MR. LOGAN: This is another matter pending, your Honor. That is with respect to subpoenaing there is another matter pending. That is that motion with respect to the Court's own order and the appearance of counsel for subpoenaing witnesses and production of documents. That is still pending before the Tribunal, and the first date on which the defense were required to file their application is October 7.

THE PRESIDENT: For the time being, we will forget about that. The judges will wait for that.

There is another matter. When you were dealing with that matter the other morning, or the afternoon, I forget which, you referred to an arrangement or an understanding that you should have a month after the close of the prosecution's evidence in which to make up your mind as to what witnesses you would need in view of the prosecution's evidence. Some of my colleagues misunderstood that to be an application for a vacation.

MR. LOGAN: Oh, no.

MR. LEVIN: Mr. President, wasn't it Dr. KIYOSÉ that --

THE PRESIDENT: You speak, Mr. Levin. I would rather you make the statement.

MR. LEVIN: Wasn't it Dr. KIYOSÉ who said that at the conclusion of the prosecution's case the defense would require approximately a month to prepare their evidence for presentation on their side; and, as I understood it, it was the nature of the request for a continuance during that period for preparation and not for any vacation.

THE PRESIDENT: Well, Dr. KIYOSÉ may have asked for a suspension of the operations of the Court for a month, put it that way, but I did not understand any American counsel to want it.

MR. LOGAN: Well, I mentioned that in passing, your Honor, in saying that when we adjourned Court during the summer, that time when were discussing what the last date should be for serving of subpoenas, that August first was fixed because that was supposed to be the end of the prosecution's case and that, at that time, we discussed at the end of the prosecution's case in all probability an order would be entered giving us until at least one month after the prosecution had rested in which to make our applications. That is the only time I mentioned it.

THE PRESIDENT: You will be going on with the defense in the meantime, but you wanted some time to consider the prosecution's evidence. I never heard vacations mentioned in Chambers. I have no record in all events and everything we say here is recorded - just as we say it, unfortunately.

MR. CUNNINGHAM: I do not think there is any doubt but they have asked for time between the end of the prosecution's case and beginning of defense's case.

MR. LOGAN: There has been no mention of it, but it has been talked about. There will probably be request for vacation. I don't want you to misunderstand that.

MR. LEVIN: The mention was made by Dr. KIYOSÉ. Dr. KIYOSÉ certainly made the statement in the record. I am sure the record can bear it out to the effect at the conclusion of the prosecution's case, the defense would require at least a month or possibly something less, some period fixed by the Court to make up preparations to present their case.

THE PRESIDENT: Well, yes. Thank you.

(Whereupon, at 0915 the proceeding in Chambers was concluded.)